Office - Supreme Court, U.S.
FILED
JUN 5 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1956

Docket No. 909

ADOLPHUS HOHENSEE,
EL RANCHO ADOLPHUS PRODUCTS, INC.
SCIENTIFIC LIVING, INC., *Petitioners*

v.

UNITED STATES

PETITION FOR REHEARING

P. BATEMAN ENNIS
Shoreham Building
Washington, D. C.
Counsel for Petitioners

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

In The

Supreme Court of the United States

October Term 1956

Docket No. 909

Adolphus Hohensee,
El Rancho Adolphus Products, Inc.
Scientific Living, Inc., *Petitioners*

v.

United States

PETITION FOR REHEARING

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition for writ of certiorari having been denied under date of May 27, 1957, petitioners respectfully pray that a rehearing thereof be granted for the reasons hereinafter set forth.

I. Grounds Not Previously Urged

1. A point which petitioners consider substantial and which was not urged specifically in the petition for writ of certiorari, involves the relationship of the Act of June 25, 1948, 62 Stat. 684; 18 U.S.C. 1, and the definition of felony and misdemeanor therein, to the felony punishment imposed upon the individual defendant by the sentence of the Trial Court, whereas the section of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 333 (a)) under which the sentence of imprisonment for one year

and one day was imposed, defines the offense as a misdemeanor. This point was noted in the brief of appellants (petitioners here) in the Court below but was not elaborated on in the Briefs or in oral argument and same was not discussed by the Court below in its opinion. The question therefore is whether the felony punishment imposed in this case, was invalid. This Court has never specifically passed upon this point. See Historical and Revisers Notes in Title 18 U.S.C.A. at page 425.

2. Another point which was noted (Petition p. 13) but which was not specifically urged as one of the grounds for issuance of the writ, was the question of the effectiveness of the Food and Drug Administration regulation appearing in 21 C.F.R. Sect. 1.106, which was for the first time referred to by respondent in its brief before the Court below, and which appears on page 4 of the brief in opposition here. The regulation, the same portions of which were also quoted in the opinion below, did not become effective until published in the Federal Register (17 F.R. 6816) on July 25, 1952—after the time of the offenses alleged in the first three counts of the indictment. It was thus an error for the Court below to consider such regulation in sustaining the conviction under those counts. Cf. *United States* v. *Treffinger* 224 F. 2d 855, 857, on point that where no regulatory standard has been formulated by the Administrator, none can be created in effect by the Courts.

3. There has not previously been raised here, the point urged before the Trial Court on defendants' motion for a new trial, (App. p. 43a) that the granting of nine peremptory juror challenges to the prosecution contrary to the provisions of Rule 24(b) Fed. Rules of Cr. Proc., fixing three without exception as the limit where the offense charged carries a misdemeanor punishment or six in the case of a possible felony punishment—was an error of law. It is apparent of record (App. p. 57(a)) that

even though the prosecutor stated that the arrangement was by stipulation, the fact remains that, as shown by the record, the individual defendant was not present and the stipulation could not bind him as a waiver. *Lewis* v. United States, 146 U.S. 370, 372 ("A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner"). See also *Prine* v. *Commonwealth,* 18 Pa. 103; *Dunn* v. *Commonwealth* 6 Pa. 384. The extra peremptory challengers allowed defendants was entirely within the discretion of the Court under the multiple defendants provision of Rule 24 (b).

4. Another point mentioned in the petition (pp. 8, 40) but not specifically urged as a reason, was the initially unauthorized participation in the trial of an attorney from the Food and Drug Administration of the Department of Health, Education and Welfare (App. p. 57(a)) as one of prosecution counsel over the objection of defendants. (Tr. pp. 4-7), contrary to the provisions of the Act of June 25, 1948, 62 Stat. 910, as amended 63 Stat. 100; Title 28 U.S.C. 507. He opened to the jury with argumentative language to which objection was made. It was not until the third day of the trial that the Departmental attorney obtained and filed his appointment by the Attorney General as a special assistant United States Attorney (Tr. p. 167). A retroactive appointment as special counsel to take effect at a date prior to the actual date of the appointment, is not authorized. *Lee* v. *United States* 45 Ct. Cl. 57.

II. Intervening Circumstances of Substantial or Controlling Effect

1. Respondents' brief in opposition seems to indicate that only one point is involved in petitioners' attack on the validity of the indictment, namely that petitioners' Reason numbered 4 (The indictment question-Petition p. 30) impliedly relates solely to the Trial Court's blocking

out of those portions of the indictment containing allegations of a prior conviction of the individual defendant, whereas another of petitioners' challenges to the indictment was on the grounds that it is apparent of record that the grand jury had been prejudiced against all of the defendants by virtue of having been informed of the criminal record of the individual defendant. Also, the motion of defendant, El Rancho Adolphus Products, Inc., for a severence and a separate trial made before trial, should have been granted on the basis of this prejudicial allegation in the indictment. Then again, because of the presence of this allegation, which the trial court interpreted as causing the alleged offense to be a felony, the prosecution, as noted under part I (3) supra, was granted and exercised nine peremptory challenges, instead of the three limited by Rule 24 (b) Fed. Rules Cr. Proc. in the case of misdemeanors.

2. The respondent's brief in opposition accentuates out of context the scope and content of the printed material, describing the Hohensee series of lectures, by omitting the portions thereof which show definitely that there was no intention present, as alleged by the prosecution, to promote a sale of El Rancho Adolphus food and dietary products. By emphasizing the portions quoted on page 7 of the brief in opposition, the respondent has in effect placed greater emphasis on the reference to diseases than is actually the case, as will be seen by an examination of the entire announcement (Exhibit 5; Tr. pp. 26-31). On page 9 of the brief in opposition this statement is made: "None of the labels of these products contained any reference to the diseases alluded to in the promotional material and for which they were recommended during the lectures." There was no "promotional material" for these products, as such. Thus by omitting to qualify the words "promotional material" with the words "for the lectures"—the impression is left that there was in evidence printed or written material advertising the products

for use in the conditions to be discussed at the forthcoming lectures. Such is not the case.

3. The Court's attention is respectfully invited to several cases the reports of which were not available in the advance sheets at the time of preparation of the petition, as follows:

(a) On the point urged in the petition ("The Evidence" p. 29) that circumstances which merely raise suspicion or give room for conjecture are not sufficient evidence of guilt, see the very recent case of *Wise* v. *United States* (5th Cir.-1957) appearing in the advance sheets as 241 F.2d 545, at page 547. And from the same circuit, see also *Maenza* v. *United States* (1957) appearing in the advance sheets as 242 F. 2d. 339, at page 341, on the point that: "It is universally held that in cases based upon circumstantial evidence, a verdict of guilty may be rendered by the trier of the facts only when the evidence may be said to exclude every reasonable hypothesis except that of guilt and to be inconsistent with every hypothesis of innocence"—and the cases therein cited.

(b) On the point that the conduct of the trial judge must be scrupulously fair, as discussed in the petition ("The Unfair Trial Issue", p. 36). See: *United States* v. *Ah Kee Eng* (2nd. Cir. 1957) 241 F. 2d 157.

4. There is now pending before this Honorable Court a petition for writ of certiorari to the United States Court of Appeals for the First Circuit in the case of *V. E. Irons, et al.* v. *United States,* October Term, 1956, docket number 1026, filed May 23d 1957, in which there are presented issues having to do with the interpretation of the same section of the Federal Food, Drug and Cos-

metic Act. (21 U.S.C. 352 (f) (1)) which is involved here—by another United States Court of Appeals. Because there is this similarity between the two cases, it is respectfully urged that the Court re-examine the issues presented by your petitioners, in concert with its consideration of the aforesaid now pending *Irons* petition.

WHEREFORE, the premises considered, it is respectfully urged that a rehearing be granted and that thereupon the petition for writ of certiorari be granted.

P. Bateman Ennis
Shoreham Building
Washington, D. C.
Counsel for Petitioners

CERTIFICATE

I hereby certify that the written petition for rehearing is presented in good faith and not for purposes of delay and that same is restricted to the grounds specified in Rule 58 (2) of the Rules of this Court.

P. Bateman Ennis